

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



v

Northern European Automotive Inc

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:43-b unpaid salary
RSA 275:42 I/II employer/employee relationship

Employer: Northern European Automotive, 126 Hall St Unit A Concord NH 03301

Date of Hearing: February 2, 2015

Case No.: 49410

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant asserts he is owed \$5,301.40 in unpaid salary for pay periods worked between July 1, 2014 and November 19, 2014, when he resigned. He argues the employer hired him during a phone conversation and offered \$36,000 annually, payable as a weekly salary of approximately \$692.00.

He also argues he was always an employee. He asked repeatedly for tax information and to be "put on the books." This did not occur.

He frequently asked for his back pay, through verbal conversations and text messages.

Timothy McLean, President, Northern European Automotive Inc, agrees the claimant is due some money. He argues he has asked for a written detailed statement of the hours owed, which he has not received.

He testified the claimant answered an ad on Craigslist for a technician and was hired on a sixty day trial basis. After the sixty days, he was not "impressed" with the work, but Mr. McLean was sick and needed the help. He decided to keep the claimant but not "put him on the books."

Mr. McLean argues he is not able to fully present his case as his attorney has been disbarred and unavailable. His attorney has all of his documents and files relating to this case.

The hearing was left open until 4:30pm on Monday, February 16, 2015, for Mr. McLean to submit his documentation. The Department received the information within the required timeframe. The claimant was given until 4:30pm on March 5, 2015, to submit a response to the documentation. The Department received the information within the required timeframe.

FINDINGS OF FACT

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria in (b), (c), (d), (e), or (f). The employer dictated the means and manner of the work to be performed, and the time during which the work was to be performed. The claimant did not and could not, hire his own assistants. The claimant did not hold himself out to be in business for himself. The claimant was not responsible for the satisfactory completion of work, and he could not be held contractually responsible for failure to complete the work.

The claimant presented credible testimony and evidence, previously submitted, that he had an agreement with the employer for a weekly salary of \$692.00.

The claimant also presented credible testimony that he did not receive his full salary for each pay period in which he performed any work as follows:

- July 2014 – four weeks * \$692.00=\$2,629.60 due, received \$2,030.00, \$599.60 due (he subtracted one day he did not work)

- August 2014 – four weeks * \$692.00=\$2,629.60 due, received, \$2,592.00, \$37.60 due (he subtracted one day he did not work)
- September 2014 – four weeks * \$692.00=\$2,768.00 due, received, \$1,980.00, \$788.00 due
- October 2014 – five weeks * \$692.00=\$3,460.00 due, received \$1,480.00, \$1,980.00 due
- November 2014 – two and one half weeks * \$692.00=\$1,944.00 due, received \$740.00, \$1,204.00 due
- The first week of July 2014, which the employer held back - \$692.00 (note July 2014 had five pay weeks, but only four pay days)

-Totaling \$5,301.20.

The employer failed to reduce the claimant's rate of pay to writing, as required by RSA 275:49.

The employer's argument that the claimant's work was subpar or that he did not show up for various individual days during weeks he did perform some work are not persuasive. RSA 275:43-b requires that an employer pay a salaried employee their full salary for any pay period in which the employee performs any work. It also allows employers to make deductions to a salaried employee's wages under certain circumstances, but none of those exceptions apply to the facts of this case.

The employer's arguments that the claimant needed to provide hours for payment and that the hours presented "did not match", are also not persuasive. RSA 279:27 requires an employer to keep a true and accurate record of the hours worked by each, wages paid to each, and classification of employment when necessary. The employer failed in their responsibility to keep a true and accurate record of hours worked.

The employer failed to present any credible testimony or evidence to show the claimant was not due the amounts he claimed, nor to refute the claimant's credible testimony and evidence.

Therefore, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed wages in the amount of \$5,301.20.

DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant prove by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of \$5,301.20.

The employer is hereby ordered to send a check to this Department, payable to Thomas Sheffer, in the total of \$5,301.20, less any applicable taxes, within 20 days of the date of this Order.

Melissa J. Delorey
Hearing Officer

Date of Decision: March 16, 2015

MJD/slh